Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 39.

PATRICIA W. VANDERBILT,
Respondent-Appellant,
vs.
CORNELIUS VANDERBILT, JR.,
Appellant-Respondent,
and
THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

Decided May 31, 1956

DESMOND, *J.*:

The principal question is as to the validity and applicability of this provision of section 1170-b of our Civil Practice Act, enacted in 1953:

> "In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife."

In 1948 plaintiff, then domiciled in Nevada, and defendant, then domiciled in California, married in Connecticut and together established in California a domicile which continued (despite much travel in this country and Europe) till they separated in September, 1952. After the separation the wife immediately went to New York City. In October, 1952, she sued in New York for a separation but that suit was dismissed because of the one-year residence requirement of subdivision 3 of section 1165-a of the Civil Practice Act. After a visit to California, plaintiff returned to New York in February, 1953, and has since resided in this State. In March, 1953, defendant husband brought in Nevada a suit for divorce, process in which was served on the wife in New York. The wife did not appear or answer in that suit which in June, 1953, produced a divorce decree in favor of the husband. In April, 1954, plaintiff, effecting service through publication of the summons and sequestration of his assets (see Civ. Prac. Act, § 1171-a) in New York, commenced this action in the Supreme Court, New York County, praying for a separation on the ground of cruelty and abandonment, and for an award of alimony (there were no children of the marriage). Defendant, appearing specially, moved to vacate the sequestration and to dismiss this action on the ground that the marriage no longer existed, and that there was in New York State no matrimonial domicile or status, or domicile of plaintiff. That motion of defendant was heard and dismissed before trial but defendant availed himself of the permission then given him to plead in his answer the alleged lack of jurisdiction over his person and over the subject matter of the cause. His answer in this suit, besides denying all the complaint's allegations of cruelty and abandonment, contained also a purported complete defense in which he called the court's attention to the Nevada divorce judgment and asserted that "full faith and credit" therefor was, under the Federal Constitution, a bar to the maintenance of this

action. We agree with defendant that he has not, by his subsequent activities in the case, waived the contentions he is still making, as to lack of personal jurisdiction (see Civ. Prac. Act, § 237-a, subds. 3[c], 4). We construe the judgment below not as one in personam against defendant but as fixing the amount of the alimony and directing its payment out of the sequestered property.

When this action came to trial, plaintiff went forward with testimony as to the alleged acts of cruelty and abandonment. Defendant did not take the stand and called no witnesses to deny that testimony. Plaintiff attempted also to establish factually that defendant's previously obtained Nevada divorce was invalid because, she urged, defendant did not have a bona fide domicile in that State (*Williams v. North Carolina*, 325 U. S. 226). We can dispose of that latter issue right now by holding that there was sufficient evidence to justify the finding made by both courts below in this cause that defendant did have a good faith domicile in Nevada for a sufficient period before his divorce decree was handed down. That proof included a showing that defendant had lived and voted and owned property in Nevada for many years before his marriage to plaintiff, that plaintiff and defendant lived there together in the early months of their marriage, that defendant returned there some months before the divorce and that defendant has continuously maintained a residence in Nevada since the divorce. The various contradictory statements shown to have been made by defendant on this subject did no more than set up a question of fact as to the good faith of the Nevada pre-divorce domicile, an issue of fact which has been conclusively settled in favor of defendant by the courts below.

After both sides had put in proof, defendant renewed his motion, previously made at the end of plaintiff's case, to dismiss the complaint on the grounds of lack of juris-

diction and of the alleged binding effect of the prior divorce. The trial court, holding that the Nevada divorce was binding in New York to the extent of dissolving the marriage, dismissed so much of the complaint as asked for a judgment of separation but (on the authority of Civ. Prac. Act, § 1170-b, *supra*) continued to entertain so much of the action as prayed for support and maintenance. Defendant objected to this on the jurisdictional grounds already described, also on the grounds that the Nevada judgment had terminated the marriage and all its obligations, that section 1170-b is unconstitutionally vague and lacking in standards as to what "justice may require", that section 1170-b if so applied would violate not only New York common law but the Full Faith and Credit requirement of the Federal Constitution, and that plaintiff had not been a resident of New York State for the one-year period required by subdivision 3 of section 1165-a of the Civil Practice Act, nor for any other period. The courts again denied defendant's dismissal motion.

The trial court then took the proofs offered by plaintiff as to amounts suitable and necessary for her support. The trial came to an end after a renewal and another denial of defendant's dismissal motions. Later, the court awarded plaintiff $250 per week for support plus an award of $3,500 for counsel fees and expenses (her counsel had previously been awarded and paid $2,500 for such fees and expenses). The support money was directed to be paid from June 8, 1954, the date of the commencement of this action. Defendant's brief argues against the amount of this award and as to its retroactivity, but these determinations in those respects were, on this record well within the discretion of the trial court, affirmed by the Appellate Division. The same answer goes to so much of plaintiff's cross appeal as disputes the adequacy of the support allowance.

We come, then, to the remaining, and principal, questions of law:

1. Does this case come within the language and intent of section 1170-b of the Civil Practice Act?

2. If the answer to the first question is "yes", is section 1170-b, so applied, invalid as violative of the Federal Constitution, or otherwise?

There should be no doubt as to the applicability hereto of section 1170-b. This is certainly an action for separation, where the court refused "to grant such relief by reason of a finding by the court that a divorce * * * had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained". Plaintiff, having resided in this State for the required one-year period, had standing to bring such a suit and jurisdiction was effected by the sequestration of defendant's New York assets. There is nothing in the statute's language to suggest that it was intended to apply only to marriages where the parties had lived together in this State as their matrimonial domicile. Presumably, the Legislature was moved to action by the clear and cogent reasoning of a report made to the Legislature by the Law Revision Commission (1953 Report of N. Y. Law Revision Commission, pp. 463-480). The report (p. 467) cited *Estin* v. *Estin* (296 N. Y. 308, aff'd 334 U. S. 541) as holding that "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an *ex parte* divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States". But, the Commission pointed out (as had one of the Supreme Court opinions in *Estin*) that there was no *procedure* available in New York State whereby similar protection of her rights to support could be had by a wife unless she, prior to the foreign divorce, had obtained an alimony order in a separation suit, as had Mrs. Estin. The procedural difficulty in this State was, of course, that

our courts have no power without statutory authority to grant maintenance to a wife and (before section 1170-b was passed) there was no statutory authority to award such alimony except as incidental to a matrimonial action (*Ramsden* v. *Ramsden*, 91 N. Y. 281; *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456; *Johnson* v. *Johnson*, 206 N. Y. 561; *Weintraub* v. *Weintraub*, 302 N. Y. 104; Civ. Prac. Act, § 1170). Recognizing that the doctrine of "divisible divorce" had been firmly established in law (*Estin* v. *Estin*, *supra*; *Lynn* v. *Lynn*, 302 N. Y. 193, certiorari denied 342 U. S. 829), the Law Revision Commission and the Legislature set out to remove the procedural bar against a wife's obtaining in the New York courts protection of those rights to support which remained to her after and despite a foreign divorce, even though that foreign divorce had effectively terminated her marriage. Therefore, the purpose, language and effect of section 1170-b support the judgment granted plaintiff in this case. What other and different situations the statute may properly be applied to, we need not and should not now specify.

The second question of law is as to the validity of the statute itself. Defendant's argument against validity boils down to an assertion that the *Estin* holding (*supra*) applies to the particular *Estin* fact pattern only. Defendant says that the court in *Estin* was dealing with a prior New York separation-alimony judgment and a later Nevada marriage-status-termination judgment, and giving effect to both those judgments. Such is not, of course, the situation here. But the situation here is in its material elements just the same as in *Armstrong* v. *Armstrong* (350 U. S. 568) where all the Justices seem to have agreed that a State may validly grant alimony after and in spite of a foreign ex parte divorce. (See also, *May* v. *Anderson*, 345 U. S. 528, as to custody of children.) We must look to the rationale, not the special facts, of *Estin* and *Armstrong* and we find that rationale to be the same as was expressed in our

Lynn v. *Lynn* opinion (302 N. Y., 193, 200-201, supra) thus: "* * * a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage" (see *Hopson* v. *Hopson*, 221 F. 2d 839). Mrs. Estin, fortunately for her, had gotten her support rights defined and adjudicated by a New York judgment before her husband went off for his foreign divorce. Section 1170-b now makes it possible for a wife to get such an adjudication after the foreign-State divorce. Until *Williams* v. *North Carolina* (325 U. S. 226, *supra*) made effective in this State ex parte divorces like that gotten by this defendant, such divorces had no effect here as to either marriage status or property rights. Then came *Williams* v. *North Carolina*, and New York had to give effect to such decrees as terminating marriages. But in the background was *Pennoyer* v. *Neff* (95 U. S. 714) and its ancient and undisturbed rule that personal service within the State where suit is brought (or waiver of such service) is required for due process of law to support a personal judgment. So, that part of a foreign (non-personal service but otherwise jurisdictionally valid) divorce decree which dealt with status had to be given effect in New York as terminating the marriage but was entitled to no effect at all so far as support or other property rights were concerned. The question is not whether the economic liabilities of a marriage can validly be held to survive a valid divorce. The point is that the divorce obtained by defendant was valid as to status only, but not as to property. The holding that such a divorce judgment was not effective as to property meant necessarily that the one who obtained it could claim no protection from it as to property. Defendant would have us say that the power to preserve, unimpaired by a foreign non-personal divorce, the liability of a husband to support his wife, is a power of that State only which has "jurisdiction of the marriage". We find no such strict limitation. True,

New York never had jurisdiction of this marriage res in the sense that New York was the parties' domicile while they lived together. But when the husband, abandoning his wife, left their California domicile to establish a Nevada domicile for his own purposes, the abandoned wife had a right to set up a New York domicile for herself and bring the matrimonial domicile to New York with her (*Hunt* v. *Hunt*, 72 N. Y. 217, 242, 243; *Dean* v. *Dean*, 241 N. Y. 240, 244; *Matter of Daggett*, 255 N. Y. 243, 247). That right she exercised in this instance before the Nevada judgment was entered and she satisfied New York's residence requirements before suing for a separation (Civ. Prac. Act, § 1165-a). We need not decide whether she would have the same right to come into New York, even after a foreign-State divorce, to take advantage of section 1170-b.

We will now consider briefly several other arguments advanced by defendant. He says that his Nevada judgment has been denied the "full faith and credit" the Federal Constitution (Art. IV; §1) demands for it. But that assertion involves two erroneous assumptions and either of those errors destroys the alleged constitutional point. Defendant assumes that New York would not enforce its section 1170-b as against a prior non-personal New York divorce judgment, and then goes on to assume that New York's supposititous refusal to apply section 1170-b as against one of its own New York judgments would mean that New York would be giving a foreign judgment less protection than a local judgment as against section 1170-b. As to defendant's first assumption, there is nothing in our statute to support the conclusion that it is inapplicable where the prior judgment was obtained in New York (the Law Revision Commission report and recommendation certainly make no such distinction, but instead recommends applicability "whether the husband's *ex parte* adjudication of marital status was obtained in a foreign court or a New York court" Pg. 468. Actually, the basis for this assumption by defendant is an

idea which pervades defendant's whole argument—that is, that it is fundamental and unchangeable New York law that an already divorced wife may never be awarded maintenance by a New York court and that an action for separation or divorce in New York presupposes an existing valid marriage (see *Bannon* v. *Bannon*, 270 N.Y. 484, 488). But section 1170-b, to the extent that it applies, has changed that old New York policy. We can go even farther, however, and declare that even if section 1170-b was unavailable as against a New York divorce, that circumstance would not mean that the New York judgment was getting more, and the Nevada judgment less, faith and credit in New York. Nevada's judgments put in evidence in New York are entitled to the same effect as they are given in Nevada, and, to avoid unconstitutional discrimination (U. S. Const., Art. IV, § 2), the same effect New York's own similar judgments are given in New York. But under the "divisible divorce" doctrine, defendant's Nevada divorce had no effect (any more than it said anything in terms) as to plaintiff's property rights. Its sole effect was to end a marriage and it has been given that effect in New York.

Defendant brands as error the making by the Appellate Division, in its order and in its judgment, of a new finding of fact that defendant had violently assaulted plaintiff and had been guilty of other cruel treatment of plaintiff which endangered and injured her health. Since the record justifies that finding, the Appellate Division had the power to make it, although the trial court had not done so (see *Bernardine* v. *City of New York*, 294 N.Y. 361, 366). As to that finding being contrary to the Nevada court's earlier determination that defendant was entitled to a divorce because of plaintiff's "Extreme Cruelty", it is settled that the Nevada finding in an in rem proceeding while conclusive as to the marriage status being dissolved, does not bind plaintiff personally nor is it conclusive as to any fact upon which the Nevada judgment is based.

(*Durant* v. *Abenroth*, 97 N.Y. 132, 141; Matter of Holmes, 291 N.Y. 261, 270, citing restatement, judgments § 74).

Other charges by defendant of deprivation of due process are without merit. He complains that he was denied a fair opportunity to present proof as to alimony but the record does not bear him out. He complains as to the vagueness of the phrase in section 1170-b "as justice may require". But that same phrase has been for many years in section 1170 of the Civil Practice Act with respect to questions of custody of children and temporary and permanent alimony in separation and divorce suits. It means (see as used in Election Law, §330) that there are no "as matter of law" requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts. Similarly without substance is defendant's statement that he was given no notice by pleadings or otherwise, in this suit brought obstensibly for a separation, that even if no separation were to be granted, an award for maintenance might still be in the offing. Adequate notice was given by the statute itself which warned that if a separation should be refused because of the foreign divorce judgment, maintenance might still be awarded.

The judgment should be affirmed, with costs to plaintiff.

Dissenting Opinion

STATE OF NEW YORK

COURT OF APPEALS

No. 39.

PATRICIA W. VANDERBILT,
Respondent-Appellant,

vs.

CORNELIUS VANDERBILT, JR.,
Appellant-Respondent,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

FULD, *J.*: (*dissenting*):

In my opinion, section 1170-b of the Civil Practice Act as here construed and applied offends against the full faith and credit clause of the Federal Constitution, and neither *Estin* v. *Estin* (334 U.S. 541, affirming 296 N.Y. 308), nor (*Armstrong* v. *Armstrong*, 350 U.S. 568), supports a contrary conclusion.

It is settled in this state that the duty of support flows from the marital status. And, before the enactment of section 1170-b in 1953, when that status terminated, so too did the duty of support, except insofar as provision for continued support may have been made in the judgment dissolving the marriage. "Such a claim in itself furnishes no foundation for a cause of action; it is a mere incident

of the judgment in a matrimonial action." (*Querze* v. *Querze*, 290 N.Y. 13, 18; see *Weintraub* v. *Weintraub*, 302 N.Y. 104, 108.)

There is no doubt that the marriage between plaintiff wife and defendant husband was effectually terminated by the Nevada divorce decree which defendant procured in June of 1953. Although the wife was not subject to the personal jurisdiction of the Nevada court, that tribunal was unquestionably empowered to adjudicate the termination of the marriage at the suit of the husband who was domiciled in that state. (See *Estin* v. *Estin, supra*, 334 U.S. 541, 544; *Williams* v. *North Carolina*, 317 U.S. 287.) And examination of the decree then rendered demonstrates that it also provided for the termination of defendant's duty to support plaintiff. In so many words, it recited that the marriage between the parties was "dissolved absolutely and forever and *they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof*". Under Nevada's decisional law, it seem clears that, in the absence of a provision either awarding alimony to the wife or reserving jurisdiction to do so, "there can be no grant of alimony after such a divorce." (*Sweeney* v. *Sweeney*, 42 Nev. 431, 438-439; see *Lynn* v. *Lynn*, 302 N.Y. 193, 203, cert. den. 342 U.S. 849.) That being so, it follows that the decree granted to defendant by the Nevada court must be taken as having cut off plaintiff wife's right to alimony. (See *Lynn* v. *Lynn, supra*, 302 N.Y. 193, 203-204.)

A different case would have been presented if, prior to the termination of the marriage by the Nevada divorce decree, the New York courts had adjudicated with respect to defendant's duty of support and had rendered a judgment against him directing payment of such support. The wife's property right in the judgment would then have assumed a status independent of the continuance of the

marital relationship, and the subsequent dissolution of the marriage by divorce would have been ineffectual in and of itself to deprive the wife of that property right—*unless* the divorcing court had acquired personal jurisdiction over the wife and had adjudicated with respect to her rights in the support judgment. That was the extent of the decision in *Estin* v. *Estin* (*supra*, 334 U.S. 541, affg. 296 N.Y. 308; see, also, *Lynn* v. *Lynn*, *supra*, 302 N.Y. 193, 202). Emphasizing that New York had "evinced a concern with this broken marriage when both parties were domiciled in New York and before Nevada had any concern with it" (334 U.S., at p. 547), the Supreme Court stressed as dominant the existence of the New York judgment (334 U.S., particularly pp. 548-549; also, dissent of FRANKFURTER, *J.*, pp. 549-550) and treated it as "a property interest" with a separate status of its own (334 U.S., at p. 548):

> "The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations."

In 1953, however, the statute now under consideration, section 1170-b of the Civil Practice Act, was passed to empower our courts to award alimony to a wife, against whom the husband had procured a valid *ex parte* divorce, even though she had not previously obtained a judgment or order for support. (See 1953 Report of N.Y. Law Rev. Comm. [N. Y. Legis. Doc., 1953 No. 65 (K)], pp. 463-480; The Commission and The Courts, 40 Cornell L.Q. 646, 656.) But that did not mean that the courts of this state would be authorized under all circumstances to award the wife

such alimony. If, for instance, the court of the other jurisdiction granting the divorce had actually decided to terminate the husband's duty of support and deny alimony to the wife, then the Federal Constitution would compel our courts to accord to that portion of the judgment, as well as to the part terminating the parties' marital status, full faith and credit and deny the wife's application for maintenance under the 1953 statute.

In other words, section 1170-b may be applied validly, that is, consistently with the dictates of the full faith and credit clause, only where the earlier *ex parte* judgment of divorce "did not purport to adjudicate the absent wife's right to alimony." (*Armstrong* v. *Armstrong, supra*, 350 U.S. 568, 569.) In such a case, to quote from *Armstrong*, the courts of the second state (Ohio), "in awarding alimony to the wife, did not in fact fail to give full faith and credit to the Florida decree" (350 U.S., at p. 569.) However, in so deciding, as Mr. Justice MINTON observed for the majority. (p. 569), the court did not reach the question whether the courts of the second state may disregard the determination in the prior divorce action that the wife was not entitled to support.

In such a case as the present, where the earlier Nevada decree in effect denied alimony to the wife (see, *supra*, pp. 354-355),[1] section 1170-b may be constitutionally invoked only on the theory that Nevada, while having jurisdiction to adjudicate the termination of the marital relationship, lacked the power, as a matter of due process, to adjudicate the concomitant termination of incidents of that relationship, which have no independent status of their own. To that I cannot subscribe. Any such arbitrary differentia-

1. As noted above, the Nevada decree here involved did in terms free and release the husband from "all the duties and obligations" flowing from the marital relationship, and that terminated the wife's right to support. (See *Sweeney* v. *Sweeney, supra*, 42 Nev. 431, 438-439; *Lynn* v. *Lynn, supra*, 302 N. Y. 193, 203.)

tion, between the marriage status and its inseparable incidents, not only does violence to basic principles of logic, but flies in the face of the constitutional requirement that the Nevada judgment be given *full* faith and credit. (Cf. *Estin* v. *Estin*, *supra*, 334 U. S. 541, 554, *per* JACKSON, *J.*, dissenting.)

The deceptive appeal of the phrase "divisible divorce" should not be permitted to obscure the basic concepts involved. A finding of divisibility may be appropriate where, as in *Estin*, the particular right at issue is a distinct property right, embodied in a previously granted judgment, which is no longer dependent, for its recognition or enforcement, upon the marital relationship, or where, as in *Armstrong*, the court rendering the divorce has itself severed the issue of support and left it subject to separate adjudication in the future. The situation is, however, decidedly different where, as in the case before us, the claim asserted depends for its very existence on the continuance of the marital status and that status and its incidents have both been terminated by a jurisdictionally valid judgment of divorce.

I find myself unable to agree with the contrary views expressed by the minority of the Supreme Court, through Mr. Justice Black, in the *Armstrong* case (*supra*, 350 U. S. 568, 575, et seq.), to the effect that the court rendering the *ex parte* divorce has no jurisdiction to pass upon the question of alimony. Justice Black reached that conclusion on the assumption that the denial of alimony constituted the rendition of "a personal judgment" against the wife "depriving her of all right to alimony." I cannot accept that reasoning, for it seems to me to rest on the erroneous premise that a mere incident of the marital status, which "in itself furnishes no foundation for a cause of action" (*Querze* v. *Querze*, *supra*, 290 N. Y. 13, 18), is the equivalent of an independent right.

In any event, however, the present case would seem to fall outside of the underlying policy of section 1170-b. At the time the Nevada judgment of divorce was rendered, plaintiff wife had no standing in New York to maintain the present action for separation and, by that token, had no enforceable right to invoke the benefits of the section. Where the husband is not a resident of this state and the parties were not married here, the wife does not have standing to maintain an action for separation *unless* she has been a resident of the state "for at least one year continuously at any time prior to the commencement of the action" (Civ. Prac. Act, §1165-a). Plaintiff first selected this state as her place of continuous residence in February, 1953, only one month before defendant instituted suit in Nevada and but four months before the divorce decree was granted by that state.

Section 1170-b authorizes an award of support "as justice may require," and the legislative design is thus made clear that any award must be consistent with the public policy of the state. Obviously, the legislative purpose was to deal with broken marriages with which New York was directly concerned. (See *Estin* v. *Estin*, *supra*, 334 U. S. 541, 549.) In order not to pervert that aim, the grant of relief should be restricted to a case where there is a substantial *nexus* between the particular marriage and this state. To read the statute as opening the door to wives from other states who take up residence in this state solely for the purpose of invoking section 1170-b, *after* the rendition of an *ex parte* judgment of divorce in another state, or on the eve of judgment or the institution of the divorce action, not only goes far beyond the legislative purpose, but also serves to flout the principle underlying the full faith and credit clause.

Only by confining the statute to the situation where the wife had standing to institute the matrimonial action

in this state at the time that the foreign divorce was granted, may New York's dealings with such a broken marriage be restricted "to the matters of her dominant concern" (*Estin* v. *Estin*, *supra*, 334 U. S., at p. 549) and unseemly conflicts between this state and other jurisdictions avoided.

The complaint should have been dismissed. Accordingly, the judgment should be modified by deleting all but the first adjudging paragraph thereof, and, as so modified, affirmed, with costs in all courts.

CONWAY, *Ch. J.*, FROESSEL, VAN VOORHIS, and BURKE, *JJ.*, concur with DESMOND, *J.*; FULD, *J.*, dissents in an opinion in which DYE, *J.*, concurs.

Judgment affirmed.

Opinion of the Appellate Division

SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

October 1955.

David W. Peck, *P.J.*,
Charles D. Breitel,
Earle C. Bastow,
Joseph A. Cox,
Francis Bergan, *JJ.*

9419-9420

PATRICIA W. VANDERBILT,
Plaintiff-Respondent,

vs.

CORNELIUS VANDERBILT, JR.,
Defendant-Appellant,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

Appeals from judgment of the Supreme Court at Special Term (DIFALCO, *J.*) entered March 31st, 1955 in the New York County Clerk's office. Plaintiff appeals from the judgment insofar as it dismisses the complaint and also insofar as the allowances for maintenance and counsel fees are insufficient; and defendant

appeals insofar as the judgment awards maintenance and counsel fees and costs and directs payment thereof by the Receiver and Sequestrator.

Sol A. Rosenblatt, of counsel (Charles Roden with him on the brief; Sol A. Rosenblatt, attorney) for Defendant-Appellant.

Monroe J. Winsten, of counsel (Charles L. Raskin with him on the brief; Monroe J. Winsten, attorney) for Plaintiff-Respondent.

Jeremiah M. Evarts for Receiver and Sequestrator-Respondent.

BREITEL, *J.*:

This is a matrimonial action in which plaintiff wife has recovered a judgment, after trial, for maintenance under section 1170-b of the Civil Practice Act. The action, in the first instance, was the classic one brought for separation under section 1161. Because of a valid prior decree of divorce in favor of defendant husband obtained in Nevada, without personal jurisdiction over the wife, relief was denied under section 1161 and alternative relief granted under the new statute, section 1170-b. The judgment in favor of plaintiff wife awarded her $250. a week maintenance from the commencement of the action and additional counsel fees of $3,500.00. The judgment also declared that the Nevada divorce decree in favor of defendant husband was valid and a bar to plaintiff wife's right to a separation. Defendant husband entered a special appearance in the case and the court declined to find, as requested by plaintiff wife, that the defendant husband had made a general appearance, thus making the judgment *in personam*, rather than one *quasi in rem* and limited to enforcement out of sequestered assets.

Both parties appeal. The husband asserts that the statute, section 1170-b, is unconstitutional and that, in any event, there was no warrant for its application. The wife, on her appeal, contends that the husband's Nevada divorce was proven invalid, that the monetary awards are inadequate, and that the court should have found that the husband had appeared generally in the action.

The judgment should be affirmed in all respects.

The case is one of first impression under section 1170-b, enacted by Chapter 663 of the Laws of 1953. The statute authorizes a court in a matrimonial action to direct maintenance for a wife "as justice may require", where the court is otherwise barred from granting a divorce, separation or annulment by reason of the prior granting of a judgment or decree for divorce or annulment in an action in which personal jurisdiction was not obtained over the wife.*

The parties were married on September 7th, 1948, in the state of Connecticut. It was the husband's fifth marriage; it was the wife's second. The prior marriages of the parties had been terminated by divorce. At the time of the marriage the husband was domiciled in Nevada. The wife was domiciled in California. Shortly after the marriage and until the physical separation between the parties in September, 1952, the couple were domiciled in California.

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* The statute reads as follows:

"§1170-b. *Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.* In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the mainte-

There was no issue of the marriage. The wife has a young daughter by her first marriage.

After the parties physically separated in September, 1952, the wife came to New York and, in October of that year, sued for separation. Her complaint was dismissed on February 27th, 1953, because she had not resided in New York for one year (Civ. Prac. Act, §1165-a, subd. 3). Such dismissal is concededly *res judicata* that there had been no actual matrimonial domicile in New York.

Just before the dismissal of her complaint in the first action, the wife returned to California. She came back to New York on February 12th, 1953, and has remained here since. In March, 1953, the husband sued for divorce in Nevada where he claimed to have resumed his domicile. That action was prosecuted by service of process on the wife outside the state of Nevada. She never appeared in that action and therefore no personal jurisdiction was obtained therein over her. It resulted in a decree in favor of the husband on June 30th, 1953.

In April, 1954, the wife commenced service by publication in this action. The service was completed by June, 1954. The complaint alleged cruelty and abandonment by the husband and asked simply for a separation with support and maintenance. No reference was made to the Nevada divorce which had in the meantime been obtained by the husband. The husband's assets in New York were sequested under section 1171-a of the Civil Practice Act. The husband entered a special appearance, and moved to dismiss

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nance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments to become due thereafter."

the complaint and vacate the sequestration on the ground that the wife was, by reason of the Nevada decree, an ex-wife, and that therefore there was no jurisdiction over the person, or the action. The motion was denied with leave to interpose the defense in the husband's answer (133 N.Y.S. 2d 314). This he did, and purported thereafter to defend the case only on the questions that the wife had no domicile in New York, that there was no matrimonial domicile in New York, and that there was no marital status upon which to base the complaint or the sequestration. He did not attend and made no attempt upon the trial to meet by his own testimony or that of other witnesses the issues of cruelty and abandonment.*

The prime issue tendered is whether a wife, who had never theretofore obtained judicial provision for her support, can maintain an action resulting in a direction for maintenance, after divorce in an action brought by the husband in which she was not served personally within the jurisdiction and in which she did not appear nor did she defend. If the answer to that question is in the affirmative, then the next issue is whether on the record the court was authorized to direct maintenance for the wife on the ground that justice so required.

Before the decisions in *Williams* v. *North Carolina* (317 U. S. 287; 325 U. S. 226) the legal concept had prevailed for some time that a valid divorce established an indivisible unitary status, even in a case where the defendant had not been served personally or appeared. This would be true in either the divorcing state or the state of the wife's domicile. In either state, at least as to the same individual, the divorce was totally recognized or could be totally ignored.

* On this appeal the husband contends that he had no opportunity to meet these issues, but that is not so. The trial court clearly indicated that after it would decide the motion to dismiss at the close of the wife's case, the husband could meet any issues that he considered relevant.

But it could not, in either of the states, be partly recognized and partly ignored. (*Haddock* v. *Haddock*, 201 U.S. 562.)

In the *Williams* cases the concept evolved that a divorce, based on constructive service alone, could, even in one state, be divisible. Later, the concept was advanced to a further stage, namely, that the marital status between the parties might be severed but that, despite such severance, the husband's economic marital obligation could survive. This development reached its clearest expression in *Estin* v. *Estin* (334 U.S. 541, affirming 296 N.Y. 308). In the Estin case it was held that a wife who had not been personally served or appeared was, nevertheless, entitled to enforce as a continuing right a judgment for separation obtained before the husband's decree of divorce in another state. In *Lynn* v. *Lynn* (302 N.Y. 193) it was made quite clear that the divisibility of the divorce decree obtained outside the state would not share the same character of divisibility if the wife appeared or defended the action brought outside the state for a divorce. It was therefore held that a prior support judgment yielded to the overriding effect of the Nevada decree obtained by the husband. In so holding, however, the court reaffirmed the concept of divisible divorce insofar as it applied to divorce decrees obtained on constructive service alone. Said Judge Fuld, on behalf of the court: "The 'divisible divorce', anomalous though it may at first appear, has become a recognized concept; it is now familiar law that a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage". (pp. 200-201)

What has happened then is that the courts, confronted with legislative difficulties in this area, have fashioned new concepts to meet the peculiar problems arising from the interplay of migrant divorce, the constitutional doctrine of full faith and credit, and the special interest of a state in

protecting its residents. Because the fashioning of these concepts is still in process, they, indeed, as Judge Fuld said, appear anomalous. The result is, however, that a divorce obtained on constructive service alone now has an effect merely limited to marital status, as distinguished from the obligations that arise from that marital status. This may not satisfy those who seek systematic consistency in the law and certainty of status in matrimonial relations, but its advocates hope that it represents a more realistic approach.

Yet, in the limited area with which we are now concerned, it would not be true to say that divisibility of marital status and the obligations that flow from it is entirely new. Divisibility always existed as between the spouses to a valid divorce based on constructive service alone. (See *Rigney* v. *Rigney*, 127 N.Y. 408, rev'd. on other grounds, *sub. nom. Laing* v. *Rigney*, 160 U.S. 531; *Haddock* v. *Haddock*, *supra*.) That, however, was a kind of vertical divisibility between the parties—one could be divorced and the other not. Now the concept of divisibility moves horizontally between the parties to separate the marital status from the marital obligations in each—both may be divorced for some purposes and not divorced for others.

Evidently, where we now stand, the valid divorce based on constructive service alone appears to be limited to the narrow status of marriage for purposes of remarriage and possible bigamy prosecution. At least, this would seem to be so insofar as the courts have passed on its effects. Certainly, however, the support obligations which derive from marital status are affected only by judgments in which the court has personal jurisdiction of the defendant.

Apart from rationale, the net effect produced by recent decisional law had been to afford severable support status for a wife divorced by constructive service alone, and only where she had prior judicial provision for support. For the wife who had not, prior to such constructive service

divorce, obtained a judgment or order for support, there was no available remedy. This was foreseeable in the *Estin* case. To many, this seemed an unfair discrimination.

In 1953, on the recommendation of the Law Revision Commission, the Legislature enacted section 1170-b (see 1953 Report of N.Y. Law Revision Commission, pp. 463-480; New York Legis. Doc. [1953] No. 65[K]).

Said the Law Revision Commission in recommending this enactment:

> "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an ex parte foreign divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States. (*Estin* v. *Estin*, 334 U. S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948).) The husband's divorce must be recognized as altering the marital status of the parties under the second *Williams* case (*Williams* v. *North Carolina*, 325 U. S. 226, 65 Sup. Ct. 1118, 89 L. Ed. 1577 (1942), but since the New York law was interpreted to permit a maintenance order in a separation action to survive a divorce, the prior maintenance order still prevails as far as the economic relations of the parties are concerned.
>
> "The *Estin* case called attention to the injustice to a New York wife whose husband has obtained a divorce in another state in an *ex parte* proceeding. Unless she had been able to get a separation order with maintenance prior to the foreign divorce, she has no remedy. Under the Civil Practice Act maintenance of the wife may be granted only as an incident to relief in a matrimonial action. Since 1883 it has been accepted law, moreover, that there is no inherent power in the Supreme Court to grant maintenance to a wife independent of statutory authority. *Ramsden* v. *Ramsden*, 91 N. Y. 281 (1883)." (p. 467).

The statute is no more than a legislative extension of the judicial concept that a divorce based on constructive service is divisible. Under the reasoning in the *Estin* case the state may provide for the enforcement of what are *in personam* financial obligations of the divorced husband. These obligations are deemed to survive constructive service divorce.* Anomalous though it may seem, it is no longer true that a divorce based on constructive service alone sunders in all aspects the marriage relation. It does so only for the very limited purpose of severing the marital status in the narrowest sense. While the *Estin* case turned on a surviving separation judgment, referred to in that case as a vested property interest, such a judgment merely declares and makes amenable to judicial enforcement a continuing economic obligation derived, but now severable, from the marital status.

Accordingly, the statute is valid for the reasons set forth. Nor is it necessary to the analysis to consider whether the statute may, as a matter of power, apply only to a wife who has had a prior matrimonial domicile in the state. The fact is that *since* she is only "divisibly divorced" she is also "divisibly married." She is married, and, if wronged, may move the marital domicile with her, for purposes of enforcing the husband's surviving *in personam* obligations to support and maintain her. An entirely different question might be presented if the Nevada divorce had been rendered before the wife took residence in New York. As a wronged wife, still undivorced, she brought the matrimonial domicile with her, even if it be only constructive matrimonial domicile. This is so despite the fact that more

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* Obviously, as was intended, the statute, with all its implications, applies to a New York constructive service divorce. (See 1953 Report of the Law Revision Commission, *supra*.) Moreover, a distinction between such New York divorces and foreign divorces would invite grave constitutional objection. (See *Estin* v. *Estin*, *supra*.)

time was required to elapse before she could qualify to bring a martimonial action. Put another way, in June 1953, she was divorced in Nevada by virtue of constructive service alone while a wife resident in New York. New York's law, not California's, therefore, must be examined to determine her marital status, whether "unitary" or "divisible."

Given the validity of the statute, we may turn now to its applicability to this case. The husband contends that the statute, apart from legislative power, and as a matter of interpretation, necessarily implies that there must have been a matrimonial domicile in New York before relief may be obtained under it. There is nothing in the language of the statute to require it. Moreover, there had been proposed legislation which would have made such a requirement, but it was never adopted (1948: Sen. Int. No. 2366, Pr. No. 2611). There are many good reasons which may be suggested for omitting such a requirement. But that policy question is for the Legislature and not the courts to decide. It suffices that the legislative power exists, once the concept of "divisible divorce" is accepted, and there is nothing to sustain the suggested narrower interpretation.

It is also argued that the wife in this case is not a "New York wife" and that the statute was designed only to assist a "New York wife." But, again, given the concept of "divisible divorce," she is a wife—still—for the purpose of obtaining enforcement of the husband's *in personam* financial obligations. The wife in this case is in New York and has been for the required one year. It is important too that she came here still undivorced.* Thus the statutory requirements for standing to sue are satisfied. But, all this

* If she had come to New York already divorced, it might be necessary to consider whether under the law of California, the state of the last actual marital domicile, any economic marital obligation survived the out-of-state constructive service divorce, and if so, what effect should be given in New York to such survival.

does not mean our remedies should be available to migrant spouses for the purposes of lawsuits, indiscriminately.

The phrase "as justice may require," like similar language in section 1170-a of the Civil Practice Act, is designed not to create a right as of course. Rather, these words confer power and obligation upon a court of jurisdiction to render directions that serve the public policy of the state and protect its residents in proper cases. It may not be perverted to make of New York a center for migrant wives to litigate matrimonial issues that belong or may be barred elsewhere. In such cases our courts would refuse to grant relief under the rubric in the statute "as justice may require."

In applying the statutory standard, a distinction should be made between an actual matrimonial domicile, established by intent of persons living together in permanent residence, and a constructive marital domicile, which arises when a wronged wife is entitled to establish the marital domicile wheresoever she will. In any matrimonial action the wife, of course, will have to establish a matrimonial domicile of the one kind or the other. That proposition is, therefore, equally true with respect to assertion of a right to relief under this statute. Where there has been an actual matrimonial domicile in New York, it is easier to satisfy the statute. If there is no actual matrimonial domicile in New York, then it will be incumbent upon the wife to establish other equally significant circumstances before she merits relief under the statute. In this case there was no actual matrimonial domicile in New York, but there are other circumstances which suggest that discretion may be exercised in the wife's behalf.

The husband in this case is a man of many residences, temporary and permanent. His wealth and occupation give him the opportunity, open to very few, to select any one of several domiciles. This makes tenuous the relationship that this couple had to any particular domicile or residence

during the four years of their marriage. Moreover, the couple frequently sojourned at the maternal home in New York City. In fact, there were particular rooms in his mother's home that were repeatedly used by the couple when in New York. The bulk of the husband's sources of income has a situs in New York. The wife, on the other hand, is supposedly destitute and is receiving welfare assistance through the City of New York. There is enough in the record from which to infer that in this matrimonial litigation, now in its fourth or fifth action or proceeding, the husband's legal headquarters are in New York. Very telling is the fact that during the marriage, according to the wife's uncontradicted testimony, she received a monthly $1,300 check from the husband's mother, in New York, for the maintenance of the household. These circumstances spell out a nexus with New York. They also negate exclusiveness of residential relation between the married couple and, say, California, or even Nevada.

Indeed, as one views the facts in this case, it is seen that the husband's ties with New York are great. His family roots and family wealth are here. It is from New York, while they lived in marriage, that the couple obtained their basic income and support. The husband's domicile may vary, but the economic and family tie to New York is persistent. It is here that his wife may alone have effective remedy against his assets. It was not unnatural or sinister for her to come here. For the purpose of enforcing the husband's economic obligation there is interest and jurisdiction in New York enough—the more so now that the wife is a public charge in this state. Accordingly, the wife, in addition to having established residence here before the divorce, and the constructive matrimonial domicile, has also sufficiently established contacts with New York to merit relief under section 1170-b.

The husband makes the point that Special Term did not

make a finding that he was a wrongdoer. Clearly, before maintenance may be ordered under section 1170-b, a wife must establish all the elements of one of the standard matrimonial causes of action. The difference is that she is not barred from relief by a divorce decree obtained on constructive service. The wife testified at length and was cross-examined about acts of cruelty—mental and physical—committed by the husband, and that in, September, 1952, he abandoned her. Special Term in its opinion found that the husband failed and refused to support the wife, and returned to the state of Nevada for the purpose of reestablishing his domicile and instituting a divorce action against the wife. If added findings with respect to the issue of cruelty are necessary there is sufficient in the record to permit such addition, and it may be effected in the settlement of the order herein.

On the wife's appeal from the finding that the Nevada divorce was valid, there is little substance. Defendant husband supplied ample evidence that he had resumed his domicile in Nevada. This was a case of a man resuming a domicile that he had had for a number of purposes for twenty years before his marriage to this plaintiff. What motivates a man's change in domicile is not important, once it becomes clear that he in fact has effected the change.

On the issue of the husband's special appearance in the action, it is quite evident that he interceded in the action to contest by cross-examination some of the substantive issues on the merits. But the language of section 237-a of the Civil Practice Act, enacted in 1951, allows precisely that, once Special Term had overruled his objection with leave to raise the defense in his answer. By virtue of the statute he had the opportunity to defend on the merits without jeopardizing his position to raise on appeal the jurisdictional issues tendered. Even though he failed to sustain on appeal his attack on the court's jurisdiction

over his person, he is not subject to an *in personam* judgment.* In recommending enactment of the new section 237-a the Judicial Council evidently did not contemplate that effect nor, apparently, did it contemplate the situation that has arisen in this case. (See 16th Annual Report of the N. Y. Judicial Council (1950), p. 185 et seq.; 17th Annual Report of the N. Y. Judicial Council (1951), pp. 58-64.) It would seem, however, the fairer practice to permit parties to rely on the language of the statute as it now appears, and if there is to be any limiting of the effect of the wording of the statute it should be done legislatively.

With regard to the allowance made for maintenance and for counsel fees, they are deemed adequate and justified by the record.

Accordingly, the judgment should be affirmed in all respects, with costs to plaintiff. Settle order.

BASTOW, COX AND BERGAN, *JJ.*, concur.

PECK, *P. J.*, dissents in a dissenting opinion.

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* What the situation would be in a truly *in rem* action it is not proper or necessary to determine in this case.

Dissenting Opinion

SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

October, 1955.

David W. Peck, *P.J.*,
Charles D. Breitel,
Earle C. Bastow,
Joseph A. Cox,
Francis Bergan, *JJ.*

9419-9420

PATRICIA W. VANDERBILT,
Plaintiff-Respondent,

vs.

CORNELIUS VANDERBILT, JR.,
Defendant-Appellant,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

PECK, *P.J.* (dissenting):

I am unable to concur with the majority of the court as to the constitutionality of Section 1170-b of the Civil Practice Act. As I read the decision of the Supreme Court in *Estin* v. *Estin*, 334 U.S. 541, it turned upon the existence of previously established property rights under a New York

judgment. The court held that the Nevada decree did not wipe out the wife's claim for alimony under the New York judgment. It does not follow that the state of the wife's domicile may, subsequent to a valid divorce obtained by the husband in another state, create new alimony rights upon some theory of retaining a continuing and surviving legal or economic interest in the wife's status or support.

Also, I am unable to see how Section 1170-b would be made applicable to cases where the divorce was granted in the State of New York. If it is not so applicable, it is discriminatory and violative of the constitutional provision respecting the equal protection of the law.

I therefore dissent and vote to strike from the judgment those provisions which are bottomed upon Section 1170-b of the Civil Practice Act.

Opinion of the Supreme Court, New York County (Dismissing Complaint)

SUPREME COURT

SPECIAL TERM — PART IX.

By MR. JUSTICE DI FALCO

1/14/55

Vanderbilt v. *Vanderbilt*.—The first affirmative defense interposed by the defendant to this complaint for a legal separation is the fact that the defendant obtained a final decree of absolute divorce from the plaintiff on June 30, 1953, in the Second Judicial District Court of the State of Nevada, in the County of Washoe. That decree is in evidence.

Plaintiff seeks to impeach the bona fides of the defendant's domicile in Nevada, thereby attacking the validity of the Nevada decree.

Under the holdings of the United States Supreme Court in the well-known case of *Williams* v. *North Carolina* (317 U. S.), and the line of cases following in accord, including our own Court of Appeals, in the *Matter of Holmes* (291 N. Y.), and cases thereafter also in accord, it has been firmly established that a decree of a sister state is entitled to and must be given full faith and credit here, unless the party assailing the validity of such domicile upon which the decree is founded adduces proof sufficient to satisfy the court of this state that such domicile was false and constitutes a fraud upon the decreeing court.

The burden of proof in this respect is upon the person who assails the validity of that decree, and in this case, of course, is upon the plaintiff.

Firmly established is the fact that the validity of the decree being recognized as a valid decree of a court of competent jurisdiction of a sister state, the burden of proof to set this decree aside rests heavily upon the plaintiff.

Plaintiff contends that the defendant has not established a residence of any particular place in any state, but that he established one to suit his own convenience at the moment, and shifted from place to place.

In my opinion the proof presented by plaintiff to disprove the bona fides of the defendant's domicile in Nevada upon which his decree is bottomed is totally lacking in probative force and weight. Plaintiff's proof is meager, and has failed to meet the burden of proof required of her to establish by a preponderance of credible evidence that the defendant was not a bona fide resident of the State of Nevada at the time he obtained his decree of divorce there, or that he had not complied with the necessary requirements with respect to the laws of that state.

Implicit in the decree of Nevada is the finding of the jurisdiction of the person and subject matter of the proceeding, the validity thereof, and the compliance of the defendant with all the legal requirements of that state.

Furthermore, the additional testimony and documentary evidence presented now before me on behalf of the defendant establishes his residence and domicile in the State of Nevada for some period in years preceding the obtaining of his divorce there. We have the evidence of his tax returns, voting records for years, automobile registration and the renewals thereof in the State of Nevada, and furthermore of his apartment and business connection there and other businesses, the fact that he resided there before his marriage to the plaintiff, and that he has consistently over the years stated at various times and shown intent that Nevada was his place of domicile.

It is apparent from the proof that many years prior to his marriage to the plaintiff the defendant had planted his "grass roots" in Nevada, and continued this conduct to a great extent even after his marriage, though he led a life of a much and varied traveller in his work and business and other activities.

Upon his break with the plaintiff the defendant returned to his old "stamping ground". This was not a new and strange territory or jurisdiction or a new haven sought for the purpose of establishing a colorable residence for the securing of a divorce as is claimed by the plaintiff.

Upon the record as it stands before me I find and decide that the plaintiff has failed to factually overcome the presumption of the validity of the defendant's Nevada decree, has failed to present any proof of probative force, and has not met or sustained the burden of proof required.

The first affirmative defense of the defendant, therefore, is a bar to the plaintiff's action for a separation, and, being sustained, the complaint bearing on this issue must be dismissed upon the merits.

In this respect this constitutes the opinion of the court pursuant to section 440 of the Civil Practice Act.

However, pursuant to the provisions of the statute, particularly and specifically section 1170-b of the Civil Practice Act, in cases such as this made and provided, I will take the proof from both parties as to their incomes and earnings and such other information as may be required and pertinent in connection with the issue of maintenance and support to be awarded, if any, to the plaintiff.

Opinion of the Supreme Court, New York County (Awarding Maintenance)

SUPREME COURT—SPECIAL TERM

PART IX

By Mr. Justice Di Falco 2/18/55

Vanderbilt v. *Vanderbilt, Jr.*—This is an action by the plaintiff against her husband for a separation on the grounds of cruelty, abandonment and non-support. Defendant interposed, as an affirmative defense constituting a bar to this action, a final decree of absolute divorce which he obtained from plaintiff on June 30, 1953, in the State of Nevada. Plaintiff challenged the bona fides of defendant's domicile in Nevada, thereby attacking the validity of that decree. The evidence of the parties was taken in respect thereof and, at the conclusion of that phase of the case, I rendered my decision (N. Y. L. J., January 17, 1955). The decision is herein incorporated by reference. I found for the defendant and dismissed plaintiff's complaint on that issue, namely, that the Nevada decree constituted a bar to plaintiff's action for separation.

However, though her action has been dismissed for the reasons stated, plaintiff makes claim for maintenance pursuant to the provisions of section 1170-b of the Civil Practice Act. Accordingly, the proof of the parties was taken as to their finances, income, and plaintiff's needs, in the event I resolve this issue of maintenance in her favor. Section 1170-b is a statute of recent enactment (L. 1953, chap. 663, April 13, 1953). The present action appears to be the first of its kind in respect of the issues raised as to the validity, application and constitutionality of the statute. The precise question has not as yet been squarely deter-

mined in any discovered decision of our courts. In view of the novel and legal issues presented, a study and analysis of the statute, its background and origin, is necessary. Defendant contends that section 1170-b may not lawfully be applied to the facts as are here presented and, in any event, contends the statute is unconstitutional.

The facts adduced at the trial before me are the following: The parties were married in Connecticut in September, 1948; at the time of the marriage defendant was domiciled in Nevada and plaintiff was domiciled in California; a few months after the marriage the parties became jointly domiciled in California. They separated in September, 1952. Plaintiff, in October, 1952, commenced a prior separation action against defendant in this court, which was dismissed by order of this court dated February 27, 1953, on the determination that plaintiff, as of October 1, 1952, had not resided continuously for one year in the State of New York before the commencement of that action. Thereafter, the defendant procured a decree of absolute divorce against plaintiff on June 30, 1953, in Nevada. That decree was obtained ex parte and plaintiff did not appear or answer therein. Plaintiff thereafter, still continuing her residence and domicile in the State of New York, commenced this present action for separation against the defendant; her complaint is verified April 5, 1954, and avers that plaintiff was a resident continuously for more than one year prior to the commencement of the action (sec. 1165-a, subdiv. 3, C. P. A.); plaintiff was therefore a resident of this state at the time of the effective date of section 1170-b; defendant was served by order of publication herein, and, on the same date that the order for publication was made, an order or sequestration was granted herein, directing the seizure by the receiver named of defendant's property within the State of New York; the receiver thereupon acquired custody and control of moneys and property of the defendant and is still holding such property and moneys. Pending the pub-

lication aforementioned, defendant, on April 30, 1954, appeared specially herein and moved to dismiss this action for lack of this court's jurisdiction over his person and of the subject matter of the action, and further, to vacate the order of sequestration, which motion was denied in all respects; thereafter, on July 1, 1954, defendant interposed his answer preserving his special appearance and objections to the jurisdiction of this court over his person and the subject matter herein. Plaintiff moved for an award of alimony and counsel fee pendente lite, which was denied to the extent of the alimony but allowed a counsel fee of $2,500 (further reference to the award will be hereinafter made). The trial proceeded before me; the validity of defendant's Nevada decree was not successfully attacked by plaintiff. I then, as aforestated, took proof upon plaintiff's application for maintenance pursuant to section 1170-b. One of the issues raised by defendant is whether or not, upon the facts adduced, plaintiff comes within the application of section 1170-b. Did the Legislature intend this statute to cover a factual situation such as is presented by plaintiff? In my opinion, the statute is framed in unambiguous language and appears to be clearly applicable to plaintiff. It reads as follows: "§1170-b. *Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.* In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary

or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

Defendant contends (1) that this is not a proper case to which section 1170-b applies because plaintiff completed her one year of legal residence in this state (sec. 1165-a, subdiv. 3 C. P. A.) after section 1170-b was enacted and after a valid divorce was obtained by the defendant; (2) that neither party had a marital domicile here in the State of New York and that plaintiff is not a "New York wife" intended by the Legislature to be protected by this statute; and (3) that, in any event, section 1170-b is unconstitutional for the reasons that it discriminates against foreign divorces and denied the defendant, a non-resident, protection of the laws equal to that afforded New York husbands.

The starting point in this discussion must necessarily be to consider the Legislature's intent when it enacted section 1170-b. I have had occasion to discuss inquiry into legislative intent, in the case of *Art Steel Co.* v. *Velazquez* (201 Misc., 141; aff'd 280 App. Div., 76), at page 144, as follows: "The intent with which statutes are enacted 'is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view' (1 Kent's Commentaries 462; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.] sec. 95). Our Court of Appeals has pointed out that courts 'do not merely read the bare end product of the legislative labors' but rather 'read the statute in the light of the state of facts which were found by the Legislature, and which prompted the enactment' (*St. Nicholas Cathedral of Russian Orthodox Church in America* v. *Kedroff*, 302 N. Y., 1, 31); and that 'statutes, directed against known and stated evils, are not to be

stretched to cover situations having no regard or reasonable relation to those evils' (*Metropolitan Life Ins. Co.* v. *Durkin*, 301 N. Y., 376, 381)." I turn, therefore, to a study of the background of the statute in question to ascertain the objects and remedies which prompted the Legislature of the State of New York to enact section 1170-b of the Civil Practice Act.

It is now well established, since the decision of the United States Supreme Court in the second case of *Williams* v. *North Carolina* (325 U. S., 226, 65 Sup. Ct., 1092), that under the full faith and credit clause of the Constitution a sister state is required to give full faith and credit to an ex parte decree of divorce obtained in another state only to the extent that the decree of divorce adjudicated the marital res and marital status of the parties. As a result of this decision experience thereafter proved that sister states were confronted with the problem of providing financial assistance to abandoned wives, in the face of the recognition of a husband's ex parte divorce. Were they to be left helpless by such foreign ex parte decrees? The courts have sought to meet and alleviate the situation by an ever broadening approach and consideration to these legal and social problems. Experience and wisdom have gradually resolved a more realistic approach thereto, whittling away at former old-fashioned legalistic barriers. It is obvious today, in the light of more broadened decisional law, that the judicial process, working itself through the constant, ever-changing problems presented, is making decided headway in solving the dilemma of the Bench, Bar and legal writers in this field of law. In this evolution of the law our United States Supreme Court recently evolved and enunciated the principle that a divorce decree obtained in a sister state, where the wife was not present and who had not been served with process in that state, and who did not appear

in that action, need not be given full faith and credit to the extent of relieving the husband from his obligation to support his wife, although that decree may be valid to dissolve the marital status of the parties. These principles are now firmly established by the cases of *Esenwein* v. *Esenwein* (325 U. S. 279, 65 Sup. Ct., 1118), *Estin* v. *Estin* (334 U. S. 541, 68 Sup. Ct., 1213), and *May* v. *Anderson* (345 U. S., 528, 73 Sup. Ct., 840). In the *Estin* case (*supra*) the husband's argument that his obligation to support his wife terminated with the legal dissolution of the marriage as soon as the relationship of husband and wife no longer existed was answered in the majority opinion at pages 1217 to 1218, as follows: "New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest. * * * The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern."

Mr. Justice Douglas, who wrote the majority opinion in the Estin case, also wrote the prevailing opinion in the first Williams case (317 U. S., 287, 63 Sup. Ct., 207) and wrote a concurring opinion in the Esenwein case (supra) where he pointed out that it was important to preserve the basic distinction between the concept of marital capacity and the concept of support for the wife, and that the Williams case involved only the issue of marital capacity. At page 1119 of the Esenwein case we find the following: "We held in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, that a Nevada divorce decree granted to a spouse

domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman who Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree." Mr. Justice Douglas continued (pp. 1119-1120): "It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served (See Yarborough v. Yarborough, 290 U. S. 202, 54 S. Ct. 181, 78 L. Ed. 269, 90 A. L. R. 924; Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518). But I am not convinced that in the absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance and support of the other spouse or the children (see Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565). The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states. * * * The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States (see Williams v. North Carolina, supra). One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance and support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a big-

amist and the offspring of his second marriage are not bastardized."

The New York State Law Revision Commission confronted with the problem presented conducted a very thorough and exhaustive inquiry and analysis of these precedents and enunciations of the statutes and decisional law of the courts. The commission prepared a very comprehensive report wherein it recommended the enactment of the new statute—1170-b of the Civil Practice Act. It would be unnecessary and burdensome to repeat either in hæc verba or even in resume the report (Legislative Document [1953], No. 65[k]), but at page 6 thereof it is stated: "The Commission believes that legislation is necessary to protect a New York wife whose right to support from her husband may now be completely cut off by an ex parte foreign divorce decree, in the absence of a previous New York separation decree with provision for maintenance. In order to avoid discrimination against foreign divorces, against which the *Estin* opinion warned, such legislation should be made applicable whether the husband's ex parte adjudication of marital status was obtained in a foreign court or a New York court. The Commission therefore recommends that the Civil Practice Act be amended by the addition of a new section 1170-b * * * ."

The report analyzes the case of Estin v. Estin (supra), which pointed out the injustice to a New York wife whose husband obtained a divorce in another state in an ex parte proceeding, and stated, that unless she had been able to get a separation order with maintenance, prior to the foreign divorce, she has no remedy. The report further emphasizes the following: That under the Civil Practice Act, maintenance of the wife may be granted only as an incident to relief in a matrimonial action, and since 1883 it has been accepted law that there is no inherent power in the Supreme Court to grant maintenance to a wife independent of sta-

tutory authority (Ramsden v. Ramsden, 91 N. Y., 281), that (Report, p. 5) an order for maintenance of a wife, after a foreign divorce decree, is not obtainable in the Domestic Relations Court of the City of New York (Domestic Relations Court Act, secs. 91, 137; Adler v. Adler, 192 Misc., 933, 81 N. Y. S., 2d 797 [Dom. Rel. Ct. 1948]); and, furthermore, that by the recent amendment to the Civil Practice Act, section 1170-a, the Supreme Court was authorized to render judgment with respect to the custody and maintenance of children where divorce, separation, annulment or a declaration of nullity of a void marriage has been denied for any reason other than a lack of jurisdiction; that the legislation proposed (sec. 1170-b) complements section 1170-a by extending similar protection to wives and the relief will be enforceable in the same manner as in any other matrimonial action (report, p. 5).

Of decided further interest on the subject is the portion of the report (p. 12) in respect of the situation in our Domestic Relations Court. It is pointed out that in the case of *Adler* v. *Adler* (*supra*) a petition was filed in the Domestic Relations Court by a wife whose husband had obtained a valid foreign divorce decree, apparently ex parte, wherein she sought support under the Domestic Relations Court Act. The petition was "regretfully" dismissed for lack of a New York judgment prior to separation. Such a prior judgment has been held in the Domestic Relations Court to be within the protection of the Estin rule by one justice of that court (*Gittelman* v. *Gittelman*, 192 Misc. 334, 80 N. Y. S. 2d 695) and denied by another ("*Morton*" v. "*Morton*," 99 N. Y. S., 2d 155) in view of the language of section 137 (1) of the Domestic Relations Court Act.

The holdings thus indicate the basic difficulty in our court is that statutory authority is lacking to grant alimony except pursuant to the matrimonial actions specified in the Civil Practice Act (secs. 1140, 1155, 1164, 1169-70), and

since the oft-cited case in 1883 (Ramsden v. Ramsden, supra) it has been accepted law that there is no inherent power in the Supreme Court to grant support for the wife. Further, at page 13 of the report, it is stated: "Since, therefore, the Children's Court Act does not authorize support for wives generally, the Domestic Relations Court can order support only for wives who have not been divorced, and the Supreme Court is limited to statutory actions, none of which authorize support for a spouse whose marriage has already been dissolved by a foreign decree, the New York courts do not appear to have jurisdiction to compel support despite a valid foreign divorce decree."

With this background and collation of decisional law presented by the commission showing the need for affirmative legislation on the subject, our Legislature thereupon enacted section 1170-b of the Civil Practice Act. As stated at page 3 of the report: "Its purpose is to authorize the Supreme Court to provide for the maintenance of a wife where the husband had previously obtained a divorce, annulment, or a declaration of nullity of a void marriage from a court which did not have jurisdiction over her person."

I am convinced that plaintiff comes within the purview and protection of this statute. She has been a domiciliary and resident of this state for more than a year prior to the commencement of this suit (April 5, 1954). She was, therefore, a resident at the time of the effective date of section 1170-b (April 13, 1953) and entitled to bring this action under section 1165-a (3) of the Civil Practice Act. Defendant procured his ex parte divorce in Nevada on June 30, 1953. Concededly, plaintiff was not served in Nevada and did not appear or answer in that action. The present dismissal of plaintiff's separation action was made, as I pointed out, solely by reason of the bar of defendant's prior Nevada decree which was not here successfully challenged by plaintiff. In view of the report and recommenda-

tions of the Law Review Commission for the enactment of section 1170-b of the Civil Practice Act, I am persuaded that the language of the statute clearly encompasses plaintiff. Defendant's contention that the statue will induce wives in foreign states to come to New York State to take advantage thereof, is not merely fallacious, it is completely without basis and untenable. The situation, if ever it proved of such consequence as to require remedy, would, of course, necessarily be the subject of legislative attention—not of the court. The present enactment is, in my opinion, clear and unambiguous. If the Legislature had other intentions, it could have clearly provided therefor and specified, as a requisite to relief under the statute, a period of residence or other requirements in this state by a wife prior to her suit in the face of the ex parte foreign divorce decree obtanied by her husband. The matter of discrimination was covered in the recommendations of the Law Review Commission, and, with that before it, I cannot but conclude that the Legislature intended this statute to apply to ex parte adjudications rendered in New York courts as well as those obtained in foreign courts. Defendant's attack on the constitutionality of the statute is rejected. The constitutionality of section 1170-b, in effect, was predetermined by the United States Supreme Court in the decisions hereinbefore referred to, where in the doctrine of divisible divorce is enunciated. Section 1170-b is a New York State codification of that doctrine in our statute law, and the incorporation thereof is a part of the public policy of this state.

It is further significant to note the following language in *Morton* v. *Morton* (199 Misc., 547), at page 557: "Doubtless it would be consonant with the full faith and credit clause and within the New York State constitutional power of the Legislature to have enacted the bill, introduced and killed at the 1948 session (Sen. Int. No. 2366. Print No.

2611), which would have added to the Civil Practice Act a new section to provide that 'when the last joint matrimonial domicile was within the State of New York, and the husband acquires domicile or residence outside of the state and obtains a valid separation or divorce decree and the wife neither appeared nor was served in jurisdiction thereof, the wife shall have a cause of action for support and for education and maintenance of the children of the marriage.' "

This statute, containing specific restrictions was defeated. The bill as eventually passed (sec. 1170-b, C. P. A), is a much broader, all-inclusive statute, with no limitations or restrictions whatever. It embraces plaintiff. Defendant argues that plaintiff does not come within the application of the statute because both parties are not domiciliaries of this state, or that plaintiff is not a domciliary of the state, and that the statute applies only to New York domiciliaries where the marital domicile was in this state and the husband had departed therefrom. I am not disposed to accept defendant's narrow construction of section 1170-b. His argument is without basis in the record. The facts are established that, although the parties had been married in Connecticut, that was neither the domicile nor residence of defendant or plaintiff. Their mode of life was one of constant luxurious t avel, with periodic places of residence or domicile. They took up a short residence or domicile in California after the marriage. There is proof in the record that at one time these parties had looked for an apartment in New York. I cannot subscribe to defendant's argument that plaintiff may not achieve her own domicile or residence in any state she chooses, after the separation of the parties under the circumstances and facts disclosed. My conclusion is not overcome by the arguments of defendant which ignore the factual situation presented by plaintiff. Plaintiff had as much right to estab-

lish a domicile or residence here, which she did, as did defendant in Nevada. Defendant failed and refused to support plaintiff, and returned to the State of Nevada for the purpose of re-establishing his domicile and there instituted his divorce action against plaintiff. She was not obligated to follow and pursue defendant to Nevada. Plaintiff had lived here before, had been living here for a period of time when separated from defendant, and she met the legal requirements for the institution of this separation action. Moreover, as heretofore pointed out, defendant's motion to dismiss this separation suit, on the ground plaintiff was not a resident, was denied.

I am of the opinion, therefore, that plaintiff is entitled to maintenance pursuant to the provisions of section 1170-b. By reason of the order of sequestration, this court may grant plaintiff allowances for her maintenance and counsel fees out of the funds and property seized and held by the receiver (*Matthews* v. *Matthews*, 240 N. Y., 28; *Geary* v. *Geary*, 272 N. Y., 390).

Coming now to the amount of the maintenance to be awarded, it is undisputed that, except for a small amount, plaintiff has not received any support or maintenance from the defendant during the pendency of this action nor since the parties have been separated. It is further undisputed that plaintiff is presently receiving the sum of $400 monthly from a charitable institution and that is her sole means of income and support. She is ill and has with her a minor child of a previous marriage. The sum to be awarded this plaintiff is not to be measured or circumscribed by the amount of the charitable aid she received. Section 1170-b does not present any new or different standard for making an award to a wife for her maintenance. Defendant's contention that section 1170-b "wholly fails to provide any standard or measure for the amount of maintenance allowable" is without merit. The standard of maintenance, it

appears, is an amount "as justice may require." Section 1170 of the Civil Practice Act provides for the support and maintenance of a wife who obtains a judgment of separation or divorce against her husband and states, in the same words as are used in section 1170-b, that the court may grant such maintenance and support for the wife "as justice requires." Despite defendant's contention, plaintiff is not in the same category as a wife whose marriage has been annulled. Plaintiff's rights are the same as they were before the defendant procured his Nevada decree of divorce. The distinction between plaintiff's status and that of a wife whose marriage has been annulled is that, in the case of the annulment, the decree adjudicates that there never had been a valid marriage from its very beginning, whereas in the plaintiff's situation there was a valid marriage and defendant's obligation to support plaintiff survived the ex parte Nevada divorce decree. Since plaintiff's right to maintenance has not been affected by the Nevada decree and is fully protected by section 1170-b, plaintiff is entitled to an award for her maintenance. I hold as being without merit defendant's argument that plaintiff may be awarded only such sum, if any, as will prevent her from becoming a public charge. Nor do I feel that plaintiff is entitled to be maintained in the standard of luxurious life and travel which she enjoyed while married to defendant. She is no longer privileged or required, as she was while married to defendant, to accompany him on his extensive trips and voyages, his lavish entertainment and mode of living, all of which necessitated large expenditures for clothes, traveling, hotels, entertainment, as more fully testified to by plaintiff and described in the record. Neither of these extremes is the test to be now applied. In my opinion, in light of the record before me, plaintiff is entitled now to maintenance in such amount "as justice requires." Studying the report of the law revision commission, I find the words "maintenance" and "support,"

as used throughout, have the same connotation; they are used interchangeably and no different meaning is either ascribed, stated or implied. Funk & Wagnalls New Standard Dictionary defines the words as follows: "*Maintenance:* 1. The act of maintaining, in any sense; as, maintenance of a family; * * * 2. that which supports or sustains; means of support * * *." "*Support:* * * * 3. To supply means for the maintenance of; furnish with what is needed; provide for; as, to suport * * * a family. * * * Syn. bear, carry, * * * maintain. * * * To maintain is to keep in a state or condition, especially in an excellent and desirable condition * * *. To *support* may be partial, to *maintain* is complete; maintain is a word of more dignity than support. * * * 2. That which supports, maintains or upholds. * * * 3. One who or that which furnishes a livelihood to a person or family; a source or means of living; also, subsistence; sustenance; living. 4. A maintaining in continuance * * *."

The evidence established defendant's income and financial status to be substantial. He is the beneficiary of the income of several trusts, the particulars of which are more fully stated in the record. Furthermore, defendant enjoys additional income from his lectures and writings.

In view of the foregoing, I find and decide that plaintiff is entitled to maintenance in the sum of $250 weekly, and to an additional counsel fee of $3,500 which includes expenses incurred. The order of Special Term stated that the allowance there of counsel fee was made "without prejudice to a review at the trial of this cause, of the nature, extent and reasonable value of the services heretofore rendered and hereafter to be rendered by plaintiff's counsel in this action, and to the making of an additional allowance therefor if, at that time, the court deems it proper * * *." The services of plaintiff's attorney were necessary. The amount previously awarded proved inade-

quate. Plaintiff's counsel testified that, of the sum of $2,500 awarded, he incurred expenses of approximately $1,500. Defendant argues that, since plaintiff is an unsuccessful litigant, her complaint having been dismissed, she is not entitled to a counsel fee. Plaintiff's separation was denied solely by reason of the bar of defendant's ex parte Nevada decree. This action is brought both for separation and maintenance. The denial of the separation did not terminate this action, for it continued in respect of plaintiff's application for maintenance and the determination of her right to maintenance under the statute discussed, both in law and in fact.

This constitutes the decision of the court pursuant to section 440 of the Civil Practice Act.

Settle judgment accordingly.

Opinion of the Supreme Court, New York County (Denying Preliminary Motion to Dismiss)

SUPREME COURT, NEW YORK COUNTY

SPECIAL TERM, PART III

30672—1954

PATRICIA W. VANDERBILT,
Plaintiff,
against
CORNELIUS VANDERBILT, JR.
Defendant.

Special Term Part 3, Jun 16, 1954
Received from Justice

McNALLY, J:

In an action for a separation the defendant moves before answer for an order dismissing the complaint and vacating an order of sequestration dated April 21, 1954, and an order of publication dated April 26, 1954, as well as the proceedings consequent on said orders. The grounds for this application are lack of jurisdiction of the subject matter of the two causes of action alleged in the complaint and lack of jurisdiction over the person of the defendant; a valid decree of divorce rendered in the Second Judicial District Court of the State of Nevada, County of Washoe, antedating the commencement of this action, and the violation of federal constitutional rights of the defendant by the commencement of this action.

The complaint alleges that the plaintiff, Patricia W.

Vanderbilt, is and has been for more than one year prior to the commencement of the action in April, 1954 a resident of this state. Two causes of action are alleged which, if established, will sustain a separation by reason of cruel and inhuman treatment, and abandonment against the defendant, Cornelius Vanderbilt, Jr.

The order of sequestration is grounded on the allegation that the defendant is not and cannot be found within the State of New York. The defendant does not dispute his absence from the State of New York.

Prior to the commencement of this action and on or about October 1, 1952, the plaintiff instituted an action for separation against the defendant which terminated in an order of dismissal dated February 27, 1953. The said order confirmed the report of a referee which found in respect of the first action (1) that the plaintiff and defendant were not residents of this state when it was commenced and that neither the plaintiff nor the defendant had been a resident of this state for at least one year continuously at any time prior thereto. This action was commenced during April, 1954. The order made February 27, 1953, in the first action does not preclude proof of the allegation presently made by the plaintiff that she has continuously for more than one year prior to the commencement of this action been a resident of this state. Proof of the latter allegation will sustain the plaintiff's right to prosecute this action under section 1165-a, Civil Practice Act.

The Nevada decree of divorce relied on by the defendant is an *ex parte* decree. It has no vitality in this state until made a judgment here (*Williams v. North Carolina*, 325 U.S. 226, 229); hence plaintiff was not required to anticipate its assertion. It is entitled to full faith and credit under Article IV, section 1, of the United States Constitution provided the defendant was domiciled in Nevada at the time it was rendered. The issue of domicil,

however, may be re-examined and determined in this action without violating the faith and credit required under Article IV (*Williams* v. *North Carolina, supra*). Plaintiff's affidavits dispute the defendant's domicile in the State of Nevada at the time he procured his decree in that State. It is obvious that if the defendant herein asserts the Nevada decree as a bar to this action, issue will be joined on the question of the defendant's domicil at the time the decree was rendered.

The defendant also contends that in the event the Nevada decree is accorded full faith and credit by this court, then the plaintiff intends to assert rights grounded on section 1170-b of the Civil Practice Act, which provides as follows:

> "§ 1170-b. Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction. In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

Plaintiff does not deny that she may rely on section 1170-b of the Civil Practice Act. It is the purpose of section

1170-b to extend the principle of *Estin* v. *Estin*, 296 N.Y. 308, affd. 334 U.S. 541, to a wife who is not fortified with a judgment for maintenance and is precluded from relief in an action for divorce, separation, or annulment by reason of an *ex parte* foreign decree entitled to full faith and credit by the courts of this state adjudicating the nullity of the marriage (see Legislative Document [1953] No. 65[K] of Law Revision Commission). Although the *Estin* case recognized the concept of a divisible divorce thereby enabling recognition of the force and effect of a foreign *ex parte* decree on the marital status and preserving the *in personam* decree for maintenance awarded by a court of this state, it would appear that the divisibility there recognized rests largely, if not entirely, upon the fact that the obligation to support decreed by the New York court had been finally adjudicated prior to the foreign *ex parte* decree of divorce. Section 1170-b makes available to a New York wife entitled to a divorce, separation, or annulment, except for the operation of an *ex parte* foreign decree severing the marriage, the rights of a wife in possession of a New York decree providing for her support, antedating the foreign *ex parte* marital decree.

The constitutional grounds relied on by the defendant assume the application of section 1170-b and that its effect is to impair constitutional rights of the defendant. On this motion, however, we do not reach the constitutional questions since they can only arise if the plaintiff comes within section 1170-b, which for its application requires a finding that the prior *ex parte* divorce decree is the basis for the refusal on the part of this court to grant the relief sought by the plaintiff in this action. If this court should find that the Nevada decree is not entitled to full faith and credit by virtue of lack of domicil on the part of the defendant at the time of its rendition, then the foundation for the arguments based upon the violation of the defendant's constitutional rights will have been destroyed. We

find, therefore, that the grounds relied on for dismissal rest upon issues of fact which may not be resolved on this application. Under the circumstances, however, and in the exercise of its discretion, the court will allow the defendant to allege the said facts in his answer (see § 237-a, Civ. Pract. Act, subd. 3[c]).

The defendant has failed to establish he is entitled to a *vacatur* of the orders of sequestration and publication. Accordingly, the motion is in all respects denied, with leave to the defendant to answer the complaint within twenty days after service of a copy of this order with notice of entry thereof.

Dated, June 16, 1954

J. McN.
J.S.C.

FILED
JUN 16, 1954
NEW YORK CO. CLERK'S OFFICE

Sec. 1170-b. Maintenance of wife where divorce or annulment previously granted on nonpersonal jurisdiction.

In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this action shall extend to unpaid

sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.

Added by L. 1953 ch. 663, effective April 13.

Sec. 1165-a. Conditions attached to maintenance of action for annulment or separation. An action to annual a marriage or for separation may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced.

* * * * *

3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action.

Sec. 1166. Residence of married woman in action for divorce or separation. If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

Sec. 1161. (Extract) Action for separation; when maintainable. An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for *any* of the following causes:

* * * * *

New York Court of Appeals
Judgment Entered May 31, 1956

No. 39

COURT OF APPEALS

STATE OF NEW YORK, } ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of May in the year of our Lord one thousand nine hundred and fifty-six, before the Judges of said Court. "

WITNESS:

The HON. ALBERT CONWAY,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

Remittitur—May 31, 1956

No. 39

PATRICIA W. VANDERBILT,
Respondent-Appellant,

vs.

CORNELIUS VANDERBILT, JR.,
Appellant-Respondent,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

BE IT REMEMBERED, That on the 2nd day of February in the year of our Lord one thousand nine hundred and fifty-six, Cornelius Vanderbilt, Jr., the appellant-respondent, and Patricia W. Vanderbilt, the respondent-appellant in this cause, came here unto the Court of Appeals, by Sol A. Rosenblatt, and Monroe J. Winsten, their respective attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Thomas F. McCoy, receiver and sequestrator-respondent, in said cause, afterwards appeared in said Court of Appeals by Jeremiah M. Evarts, his attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Sol A. Rosenblatt, of counsel for the appellant-respondent, and by Mr. Monroe J. Winsten, of counsel for the respondent-appellant, no appearance for Thomas F. McCoy, receiver and sequestrator-respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs to plaintiff.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs &c, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the

said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, May 31, 1956.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

STATE OF NEW YORK
COURT OF APPEALS

RAYMOND J. CANNON
Clerk

Judgment of Supreme Court, New York County, Entered June 8, 1956 on Judgment of the Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

JUDGMENT OF AFFIRMANCE

PATRICIA W. VANDERBILT,

Plaintiff,

—against—

CORNELIUS VANDERBILT, JR.,

Defendant.

The above mentioned defendant having appealed to the Court of Appeals from so much of the order of the Appellate Division of the Supreme Court, First Judicial Department, dated December 20th, 1955, and entered in the office of the Clerk of said Court on December 29th, 1955, and from so much of the judgment entered thereon with costs in the office of the Clerk of the County of New York on December 30th, 1955, as affirms with costs that part of the judgment entered in the above entitled action in the office of the Clerk of the County of New York on March 31, 1955, which awards plaintiff maintenance and counsel fees and which directs the payment of the amount thereof by the defendant and by the Receiver and Sequestrator in this action, and which awards plaintiff judgment for costs against the defendant in the sum of $375.30 and which directs the payment of the amount thereof by the

said Receiver and Sequestrator and which may permit continued retention, collection and payment out by said Receiver and Sequestrator of defendant's funds, money, property and other assets, as is stated in his notice of appeal; and plaintiff having appealed to the Court of Appeals from so much of said order of the Apellate Division of the Supreme Court, First Judicial Department, and from so much of said judgment entered thereon in the office of the Clerk of the County of New York as affirms that part of the said judgment entered in the above entitled action in the office of the Clerk of the County of New York on March 31, 1955, which adjudges that the Nevada divorce decree in favor of the defendant is a bar to plaintiff's cause of action for a separation, and which denies to the plaintiff a separation and dismisses that part of the plaintiff's complaint relating to the relief of separation, and which fails to adjudge that jurisdiction of the person of the defendant was acquired in this action and which excludes from said judgment the sixth decretal provision of the plaintiff's proposed judgment, as is stated in her notice of appeal, and the Court of Appeals having heard said appeals, and ordered and adjudged that the judgment so appealed from be affirmed, and judgment be entered for the plaintiff, with costs of said appeals, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court, and directing the entry of a judgment of affirmance herein with costs of said appeals to be taxed against the defendant herein,

NOW ON MOTION OF MONROE J. WINSTEN, attorney for plaintiff, it is

ADJUDGED that the judgment of the Appellate Division

of the Supreme Court, First Judicial Department entered herein in the office of the Clerk of the County of New York on the 30th day of December, 1955, be, and the same hereby is, affirmed, and that plaintiff, PATRICIA W. VANDERBILT, recover of defendant, CORNELIUS VANDERBILT, JR., the sum of $95 79/100 costs of said appeals as herein taxed, to be paid by the Receiver and Sequestrator out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive as such Receiver and Sequestrator.

Dated: New York, N. Y.,
June 8th, 1956.

ARCHIBALD R. WATSON
Clerk.

Plaintiff's Address:

230 East 51st Street
New York, N. Y.

Defendant's Address:

First National Bank Building
Reno, Nevada.

FILED
JUNE 8, 1956
NEW YORK
COUNTY CLERK'S OFFICE

Judgment of Supreme Court, New York County, Entered After Trial on March 31, 1955

At a Special Term, Part IX, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House at Foley Square, in the Borough of Manhattan, City of New York, on the 30th day of March, 1955.

PRESENT:

HONORABLE S. SAMUEL DI FALCO,
Justice.

Special Term Part IX
Mar 30 1955
Received from Justice

[SAME TITLE]

This action having been duly brought on by the plaintiff for a judgment in her favor and against the defendant for a separation from the defendant from bed and board forever on the grounds of cruel and inhuman treatment, abandonment and non-support, and also for reasonable provision for the maintenance of the plaintiff out of the assets and income of the defendant; and said action having been commenced on April 21, 1954, by the making of an order for the service of the summons herein upon the defendant by publication, and the summons herein having been duly served upon the defendant herein by publication and otherwise in compliance with the said order for publication, and proof of such service and compliance with said order having been duly filed herein on June 7, 1954; and on April 21, 1954, an order having been made herein duly appointing

Thomas McCoy, Esq., as Receiver and Sequestrator of the property, assets and income of the defendant within the State of New York, and said Receiver and Sequestrator having duly qualified and is still acting as such; and as such he is now in possession of assets, property and income belonging to the defendant herein; and on or about April 30, 1954, the defendant herein having served a notice of special appearance herein by his attorney, Sol A. Rosenblatt, Esq., for the purpose of objecting to the jurisdiction of this Court of the person of the defendant, and of the subject of this action; and thereafter, and on or about July 1, 1954, the defendant having joined issue herein by the service of his answer to the complaint herein, in which answer the defendant stated that he was appearing specially herein by virtue of the order of the Court entered June 16, 1954 pursuant to Section 237-a C. P. A. subd. 3(c) and this cause having duly come on for trial before me at a Special Term, Part IX of this Court, on the 10th, 11th, 12th, 13th, 14, 24th and 25th days of January, 1955; and the plaintiff having appeared by Monroe J. Winsten, Esq., her attorney, and the defendant having appeared herein by Sol. A. Rosenblatt, Esq., his attorney, and the plaintiff having adduced her proofs and evidence in respect of the allegations of the complaint with respect to cruelty, abandonment and non-support, and the Court not having considered the same in respect of plaintiff's claims for a separation because such claim for separation was barred by the ex parte Nevada decree of divorce obtained by defendant against plaintiff, and the Court having considered said proofs and evidence in connection with plaintiff's claim and plaintiff's needs for her maintenance, pursuant to Section 1170-b of the Civil Practice Act, and the Court having rendered and filed its decisions in writing, deciding, among other things, that the plaintiff herein is not entitled to a separation by reason of its finding that a decree of divorce had been previously granted to the defendant

herein in an action in which jurisdiction over the person of the plaintiff herein was not obtained, and that such decree in the State of Nevada was entitled to full faith and credit and was a bar to plaintiff's action for a separation, and that notwithstanding such finding, justice requires that the plaintiff herein is entitled to be supported and maintained by the defendant herein pursuant to Section 1170-b of the C. P. A., and due deliberation having been had thereon, it is

ORDERED, ADJUDGED AND DECREED, that a separation is hereby denied to the plaintiff, Patricia W. Vanderbilt, and that by reason of the bar of the Nevada decree in favor of the defendant, plaintiff's complaint for separation is dismissed on the merits, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Cornelius Vanderbilt, Jr., be and he hereby is directed to pay to the plaintiff, Patricia W. Vanderbilt, as and for her maintenance, the sum of Two Hundred and Fifty ($250.00) Dollars, each week from and after the 8th day of June, 1954, and weekly thereafter, said payments to be made to the plaintiff herein at the office of her attorney, Monroe J. Winsten, Esq., 320 Broadway, New York 7, N. Y., or to such other address as the plaintiff hereafter may designate in writing by notice mailed to the defendant at his last known place of residence and to the Receiver and Sequestrator herein, and it is further

ORDERED, ADJUDGED AND RECEIVED, that Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay to the plaintiff herein the aforementioned sum of $250.00 per week in accordance with the provisions of this judgment, by payment to the plaintiff herein of a sum equal to the sum of $250.00 multiplied by the number of weeks which shall have elapsed from June 8th, 1954, to the date of the payment of the aforementioned

sum by said Receiver and Sequestrator to the plaintiff, and said Receiver and Sequestrator is hereby authorized and directed to pay to the plaintiff the additional sums of $250.00 one week after the date of the aforementioned payment, and the sum of $250.00 weekly thereafter in each and every week, out of the moneys, funds, property and other assets which he, as such Sequestrator and Receiver, has received or may become entitled to receive as such Receiver and Sequestrator herein, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Cornelius Vanderbilt, Jr., be and he hereby is directed to pay the sum of $3,500.00 hereby awarded to the plaintiff as and for an additional allowance for counsel fees for services rendered by her counsel, to and including the date of the entry of this judgment, the said sum of $3,500.00 shall be paid at the office of Monroe J. Winsten, Esq., 320 Broadway, New York, N. Y., and it is further

ORDERED, ADJUDGED AND DECREED, that Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay the aforementioned sum of $3,500.00 in accordance with the provisions of this judgment to plaintiff at the office of Monroe J. Winsten, Esq., as attorney for the plaintiff herein, out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive herein as such Receiver and Sequestrator herein, and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiff, Patricia W. Vanderbilt, do recover from the defendant, Cornelius Vanderbilt, Jr., the sum of $375.30 costs to be taxed and inserted by the Clerk of this Court, and the said Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay the

amount of such costs to Monroe J. Winsten, Esq., as attorney for the plaintiff herein, out of the moneys, funds, property and assets, which he, as such Receiver and Sequestrator, has received, or may become entitled to receive herein as such Receiver and Sequestrator.

ENTER

S. S. Di F
J.S.C.

ARCHIBALD R. WATSON
Clerk of the County of New York

Filed

Mar 31, 1955
New York
Co. Clerk's Office

Plaintiff's Address: 138 East 38th St., New York, N. Y.

Defendant's Address: First National Bank Bldg., Reno, Nevada.

Nevada Decree of Divorce dated June 30, 1953

No. 146,128 Dept. No. 1

In the

SECOND JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

In and for the County of Washoe

JOHN S. SINAI
Attorney for Plaintiff

FILED
Jun 30 9 39 AM '53
H. K. BROWN, Clerk
By S. HANNUN
Deputy

CORNELIUS VANDERBILT, JR.,

Plaintiff,

vs.

PATRICIA W. VANDERBILT,

Defendant.

DECREE OF DIVORCE

The above-entitled action came on regularly for trial this 30th day of June, 1953, before the above-entitled Court without a jury, JOHN S. SINAI appearing as attorney for the plaintiff, and the default of the defendant having been duly entered, made, and taken, and it appearing that the defendant has been legally and duly served with process

and has failed to appear and answer within the time prescribed by law; and it appearing to the Court that the plaintiff is now and has been for more than six weeks last past, immediately preceding the filing of the Complaint, a resident of and domiciled in the City of Reno, County of Washoe, State of Nevada, and the Court having listened to the testimony introduced at said hearing, from which it appears and the Court finding that all of the allegations of the complaint are sustained by the testimony, free from all legal exceptions as to the competency, admissibility and sufficiency, and the same having been submitted to the Court for its decision, and the Court having filed its Findings of Fact and Conclusions of Law, determining that the above-named plaintiff is entitled to a decree of divorce from the defendant upon the ground of Extreme Cruelty, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore and now existing between the above-named plaintiff and defendant be, and the same hereby are, dissolved and declared forever at an end, said divorce to be in full force and effect immediately, there being no provision in the laws of the State of Nevada for interlocutory divorce or restrictions on remarriage of either party; that the marriage heretofore and now existing between the parties hereby is dissolved absolutely and forever, and they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof; and each of the parties hereby is restored to the status of unmarried persons.

DONE in Open Court this 30th day of June, 1953.

/s/ JOHN S. BELFORD
District Judge

Extract From Final Order of Supreme Court, New York County, dated February 27, 1953, Dismissing First Separation Action

"ORDERED, that the said Referee's Report (1) that the plaintiff and the defendant were not residents of this State when the action was commenced, and (2) that neither the plaintiff nor the defendant was a resident of this State when the action was commenced, nor had he or she been a resident thereof for at least one year continuously at any time prior to the commencement of the action on October 1, 1952, be and the same hereby is, in all respects, confirmed; and it is further

ORDERED, that the defendant's consolidated motions to set aside the service of the summons and to dismiss the complaint and for judgment dismissing the complaint and each course of action therein alleged, be and the same hereby are, in all respects, granted;"